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In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, ET AL.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF RETIRED GENERALS AND ADMIRALS AND MILT BEARDEN IN SUPPORT OF PETITIONER
(Geneva Conventions – Judicial Deference)

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QUESTION PRESENTED

Amici will address the following question:

Whether the federal courts may require the President to afford a Guantanamo detainee the protections of the Geneva Conventions.

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TABLE OF AUTHORITIES

FEDERAL CASES

Baker v. Carr,
369 U.S. 186 (1962) 10

British Caledonian Airways Ltd. v. Bond,
665 F.2d 1153 (D.C. Cir. 1981) 10

Brown v. United States,
12 U.S. (8 Cranch) 110 (1814) 24

Diggs v. Richardson,
555 F.2d 848, 851 (D.C. Cir. 1976) 11

F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct.
2359, 2366 (2004) 14

Factor v. Laubenheimer,
290 U.S. 276 (1933) 10

Foster v. Neilson,
27 U.S. (2 Pet.) 253 (1829) 11

Gherebi v. Bush,
352 F.3d 1278 (9th Cir. 2003), *as amended by* 374 F.3d
727 (9th Cir. 2004) 20

Gratiot v. United States,
45 U.S. (4 How. 80), 117 (1845) 14

Hamdi v. Rumsfeld,
124 S. Ct. 2633 (2004) 14, 20

Japan Whaling Association v. America Cetacean Society,
478 U.S. 221 (1986) 10

Johnson v. Eisentrager,
339 U.S. 763 (1950) 13

Jones v. Meehan,
175 U.S. 1 (1899) 10

Johnson v. Browne,
205 U.S. 309 (1907) 10

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) 23

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 10

McCulloch v. Sociedad Nacional de Marineros,
372 U.S. 10 (1963) 14

Mehinovic v. Vuckovic,
198 F. Supp. 2d 1322 (N.D. Ga. 2002) 20, 23

Murray v. Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 14

Nicaragua v. United States,
1986 I.C.J. 14 (1986) 22

Owings v. Norwood's Lessee,
9 U.S. 344 (1809) 9

Perkins v. Elg,
307 U.S. 325 (1939) 10, 11

Rainbow Navigation, Inc. v. Department of the Navy,
686 F. Supp. 354 (D.D.C. 1988) 10

United States v. Decker,
600 F.2d 733 (9th Cir. 1979) 11

United States v. Percheman,
32 U.S. (7 Pet.) 51 (1833) 11

FEDERAL CONSTITUTION, TREATIES AND STATUTORY AUTHORITY

10 U.S.C. § 836 15

101 Cong. Rec. 9960, 9962 (1955) 3

Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 35 ..... *passim*

OTHER FEDERAL MATERIALS

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997) 12

Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (1992) 21

Dep't of State Bull. 10 (Jan. 4, 1971) 5

Dep't of the Army, Field Manual No. 27-10, The Law of Land Warfare, ch. 3, § I ¶ 71 (1956) 12

Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations, 84th Cong., 1st Sess. (1955) ..... *passim*

Judge Advocate General's School, *Operational Law Handbook* (O'Brien ed., 2003) 19

NWP 1-14M: The Commander's Handbook on the Law of Naval Operations § 11-7 (1995) 19

Taft IV, William H., Legal Adviser, Department of State, Memorandum to Counsel to the President (Feb. 2, 2002) 4

MISCELLANEOUS

59 *International Law Studies: Prisoners of War in International Armed Conflict* (Naval War College Press, 1978) 13

George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891 (2003) 19, 20

Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 Conn. J. Int'l L. 127 (2003) 17

Milt Bearden, *When the CIA Played by the Rules*, N.Y. Times, Nov. 4, 2005 6-7

Steven W. Becker, "*Mirror, Mirror on the Wall. . .*": *Assessing the Aftermath of September 11th*, 37 Val. U. L. Rev. 563 (2003) 8

Gary B. Born, *International Civil Litigation in the United States Courts* 19 (3d ed. 1996) 14

John Cloud, *What's Fair in War?*, Time, April 7, 2003 8

Contemporary Practice of the United States Relating to International Law, 62 Am. J. Int'l L. 754 (1968) 19

Federalist No. 22, *The Federalist Papers* (Clinton Rossiter ed., 1961) 9

Joan Fitzpatrick, *Agora: Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int'l L. 345 (2002) 17

Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 Hastings Int'l & Comp. L. Rev. 303 (2002) 18

Harold Hongju Koh, *The Case Against Military Commissions*, 96 Am. J. Int'l L. 337 (2002) 8

International Committee of the Red Cross, *States Party to the Geneva Conventions and their Additional Protocols*, Feb. 6, 2004 15

Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1 (2003) 22

Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Need for Their Revision*, 45 Am. J. Int'l L. 37 (1951) 4

Lawyer's Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (2003) 9

Howard S. Levie, *Prisoners of War in International Armed Conflict* (1977) 4, 17

Paul Lewis, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. Times, Oct. 8, 1993 7

Jan McGirk, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002 19

Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 Harv. Int'l L.J. 301 (2003) 7

Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59 (2003) 8

Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 Int'l Rev. Red Cross 571 (2002) 18, 20

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 20

Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. Int'l L. & For. Aff. 331 (2003) 17

Restatement (Third) of the Foreign Relations Law of the United States § 111, cmt. h (1987) 14

Rowan Scarborough, *Powell Wants Detainees to the Declared POWs*, Wash. Times, Jan. 26, 2002 16

Safeguarding the Enemy Within, 71 Fordham L. Rev. 2565 (2003) 19

Maj. Gen. George S. Prugh, *Vietnam Studies, Law at War: Vietnam 1964-73* (1975) 5

Oscar M. Uhler et al., *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Jean S. Pictet ed., 1958) ..... *passim*

INTEREST OF AMICI [1]

Amici include five retired senior military officials with extensive experience in issues relating to legal policy, the laws of war, and armed conflict, who have spent their careers commanding troops at home and overseas and protecting the nation from attack; and a retired intelligence officer who ran the CIA's covert operations in Afghanistan during the Soviet occupation. Amici, combined, represent nearly 200 years of learning and experience.

General Merrill A. McPeak served in the United States Air Force from 1957 to 1994. From 1990 to 1994, he was Chief of Staff for the Air Force and the senior officer responsible for a combined active-duty, National Guard, Reserve, civilian workforce of more than 850,000 people serving at 1,300 locations in the United States and abroad.

Milt Bearden, SIS Level 5, retired from the Central Intelligence Agency in 1994 after 30 years of service as an intelligence officer. Mr. Bearden ran the CIA's covert operations in Afghanistan during the Soviet invasion, and helped train Afghan freedom fighters. During his career, Mr. Bearden was station chief in Pakistan, Nigeria, Germany, and the Sudan, and served as chief of the CIA's Soviet-East European Division during the last days of the Soviet Union. Mr. Bearden received the CIA's highest honor, the Distinguished Intelligence Medal, and is the author of *The Main Enemy*, a book about the CIA-KGB spy wars.

Vice Admiral Lee F. Gunn served in the United States Navy for 35 years. From 1997 to 2000, he served as Inspector General of the Department of the Navy. Admiral Gunn commanded the USS Barbey, Destroyer Squadron Thirty-One, and Amphibious Group Three, comprising the 21 ships, 12 shore commands, and 15,000 sailors and

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[1] Letters of consent have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. For purposes of this brief, amici adopt Petitioner's statement of facts.

marines of the Pacific Amphibious Forces. Admiral Gunn served under General Anthony Zinni as Deputy Combined Forces Commander and Naval Forces Commander for Operation United Shield, the final withdrawal of United Nations peacekeeping forces from Somalia in 1995.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After attending law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter served as the Navy's Judge Advocate General. Admiral Guter now serves as the Dean of Duquesne University School of Law in Pittsburg, Pennsylvania. Admiral Guter was inside the Pentagon when it was attacked on September 11, 2001.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

Brigadier General Richard O'Meara retired from the United States Army after 36 years in the active and reserve components. He is a combat veteran and former Assistant to the Judge Advocate General for Operations (IMA). General O'Meara is a professor of International Relations at Monmouth University in New Jersey, and he serves as adjunct faculty in the Defense Institute for International Legal Studies. General O'Meara has lectured on human rights and the rule of law in such diverse locales as Cambodia, Rwanda, and the Ukraine, and serves as a defense expert before the Special Court in Sierra Leone.

SUMMARY OF ARGUMENT

The decision of the court of appeals directly and immediately endangers American troops and undermines the laws of war. The United States became a party to the Geneva Conventions to protect American troops by establishing an international norm of fair and humane treatment of all individuals captured in armed conflicts. Affording the protections of the Conventions to all individuals captured by the United States in armed conflicts is vital to the well-being of Americans captured in such conflicts. The Judiciary has the final say as to the meaning of treaties of the United States. It has the power and duty to enforce them and has done so for nearly 200 years. Judi-

cial enforcement of the Conventions does not require new action by Congress. The Court should rule that Petitioner is entitled to the protections of the Conventions and direct the President to afford him those protections forthwith.

ARGUMENT

I. THE SAFETY OF AMERICAN SOLDIERS CAPTURED ABROAD DEPENDS ON APPLYING THE GENEVA CONVENTIONS TO ALL INDIVIDUALS CAPTURED BY THE UNITED STATES

A. The United States Adopted the Geneva Conventions to Protect Americans Captured in Armed Conflict.

The Geneva Conventions establish norms for the treatment of citizens of signatory nations captured during war. The United States became a party to the Conventions to protect the safety and welfare of its own citizens. As Secretary of State Dulles said during Senate consideration of the Conventions, America's "participation [in the Conventions] is needed to * * * enable us to invoke them for the protection of our nationals." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955). Senator Mansfield similarly urged that "it is to the interest of the United States that the principles of these conventions be accepted universally by all nations," because "[t]he conventions point the way to other governments." He stated:

> Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment.

101 Cong. Rec. 9960 (1955). Senator Alexander Smith voiced the same view:

> I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is the United States * * * To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment.